

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TAREQ AQEL MOHAMMED	.	Civil Action No. 1:17CV116
AZIZ, et al.,	.	
	.	
Petitioners,	.	
	.	
vs.	.	Alexandria, Virginia
	.	February 3, 2017
DONALD TRUMP, President of	.	10:00 a.m.
the United States, et al.,	.	
	.	
Respondents.	.	
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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PETITIONERS:	SIMON SANDOVAL-MOSHENBERG, ESQ. Legal Aid Justice Center 6066 Leesburg Pike, Suite 520 Falls Church, VA 22041 and PAUL W. HUGHES, ESQ. Mayer Brown LLP 1999 K Street, N.W. Washington, D.C. 20006
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FOR THE RESPONDENTS:	EREZ R. REUVENI Senior Litigation Counsel United States Department of Justice Civil Division, Office of Immigration Litigation P.O. Box 868 Ben Franklin Station Washington, D.C. 20044
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(APPEARANCES CONT'D. ON FOLLOWING PAGE)

(Pages 1 - 54)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

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10 OSMAN NASRELDIN AND
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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 17-116, Tareq Agel Mohammed
3 Aziz, et al., v. Donald Trump, President of the United States,
4 et al. Will counsel please note their appearances for the
5 record.

6 MR. RAPHAEL: Good morning, Your Honor. Stuart
7 Raphael from the Commonwealth of Virginia.

8 THE COURT: Good morning.

9 MR. HERRING: Good morning, Your Honor. Mark
10 Herring.

11 THE COURT: Good morning.

12 MR. HEAPHY: Good morning, Your Honor. I'm Jim
13 Heaphy at Hunton & Williams. I'm here for Osman Nasreldin and
14 Sahar Fadul.

15 THE COURT: Good morning.

16 MR. HEAPHY: Good morning.

17 MR. SANDOVAL-MOSHENBERG: Good morning, Your Honor.
18 Simon Sandoval-Moshenberg, Legal Aid Justice Center, appearing
19 pro bono for the Aziz petitioners; and with me is Paul Hughes
20 with the Mayer Brown law firm, who has been admitted pro hac
21 vice.

22 THE COURT: Good morning, counsel. We almost ran out
23 of seats for you-all, didn't we?

24 MR. BARGHAAN: And good morning, Your Honor.
25 Assistant United States Attorney Dennis Barghaan on behalf of

1 the respondents. With me today is Erez Reuveni from the Office
2 of Immigration Litigation at the Department of Justice, the
3 Civil Division, and he will be arguing the cause on behalf of
4 the respondents this morning.

5 THE COURT: Don't you want to do that, Mr. Barghaan?

6 MR. BARGHAAN: Can I plead the fifth?

7 (Laughter.)

8 THE COURT: You realize you'll be quoted on that one,
9 I'm sure. All right.

10 Well, I'm glad everybody is smiling this morning
11 because I hope we can resolve what's before us today in a good
12 and amicable and civil fashion. All right, we have several
13 motions before us, and I want to address the first one, which
14 is the motion to hold in abeyance. It's my understanding that
15 in terms of the two Aziz plaintiffs, they have worked out their
16 dispute with the United States. Is that correct?

17 MR. REUVENI: That is correct, Your Honor.

18 THE COURT: All right. Could you -- how close is
19 that resolution to being finalized?

20 MR. REUVENI: So we have a signed settlement document
21 that both parties have countersigned. It is not finally
22 executed; that will take several days. There are certain
23 conditions in the settlement that need to be -- need to occur
24 before the settlement is finally executed, at which point
25 our -- the terms of the settlement will lead to dismissal of

1 the Aziz brothers' claims.

2 THE COURT: But as you know, there were other, I
3 believe, 60 John Does also named in that complaint --

4 MR. REUVENI: Yes.

5 THE COURT: -- so that there are other claims that
6 still are potentially unresolved.

7 MR. REUVENI: I don't want to speak on behalf of
8 plaintiffs' counsel, but there is language in there that the
9 government believes addresses those claims as well. It just
10 leads -- it would lead to a dismissal without prejudice, and if
11 those claims are picked up again, if individuals are identified
12 that can raise those claims, they'd be free to bring them
13 before the Court.

14 THE COURT: All right. Well, that, I think, then is
15 a segue into the motion from the commonwealth to intervene in
16 this case. Mr. Raphael?

17 MR. RAPHAEL: Your Honor, if I may, I think
18 Mr. Heaphy has a motion to intervene. It would make sense for
19 sequencing purposes for him to -- for the Court to address
20 that. I think he's going to be very brief.

21 THE COURT: All right, that's fine.

22 MR. HEAPHY: Thank you, Your Honor. Your Honor, good
23 morning again. I'm Tim Heaphy, and I'm here representing the
24 proposed intervenors Osman Nasreldin and Sahar Fadul.

25 We have filed a motion to intervene in this matter

1 because our clients are in a very same position as the
2 petitioner-plaintiffs, the Aziz brothers. Very briefly, Your
3 Honor, our clients are an American citizen, Mr. Nasreldin, and
4 his Somali fiancée, Ms. Fadul. She was on the very same flight
5 with the Aziz brothers from Ethiopia to Dulles Airport on
6 Friday, January 28.

7 She was detained at the airport, asked to sign a
8 paper, we believe, withdrawing her K-1 visa, which she had been
9 lawfully issued by the embassy in Sudan, and when she did sign
10 that document, despite the fact that she doesn't speak English
11 and did not understand it, she was immediately returned to
12 Ethiopia, and it is on that basis that we have filed the motion
13 to intervene and seek the Court's leave to help us reverse that
14 action and get her admitted on that lawfully issued K-1 visa.

15 THE COURT: So she's within those 60 John Does that
16 were part of the original case.

17 MR. HEAPHY: I believe so, Your Honor, but again --

18 THE COURT: Well, if she was at Dulles Airport --

19 MR. HEAPHY: She was.

20 THE COURT: -- she was among those.

21 MR. HEAPHY: She was. I think she was actually on
22 the same flight, Your Honor, yes. But again, we also represent
23 her American citizen husband, who is a resident of Colorado.

24 Now, we have also been offered a proposed resolution
25 by the United States. I think it is exactly the same

1 resolution that is offered the Aziz brothers, and that
2 essentially would be to return Ms. Fadul to the United States
3 on that originally executed K-1 visa, and we are inclined to
4 work with the United States to have that occur, but we do not
5 believe that the litigation should be held in abeyance.

6 Our preference is for Your Honor to grant our motion
7 to intervene because there are common questions of law and fact
8 at issue with our clients and the Aziz brothers, but until our
9 client is returned to the United States pursuant to that
10 agreement, this is a very live controversy.

11 THE COURT: All right.

12 MR. HEAPHY: As a matter of fact, we actually asked
13 the Court to set a deadline by which we would file a
14 substantive complaint, and if Ms. Fadul has been returned,
15 obviously, that would moot that, and we would withdraw for --
16 or seek to dismiss our case, but we believe, Your Honor, it's a
17 very live controversy, and unless and until Ms. Fadul is
18 returned to this country pursuant to this negotiated settlement
19 that we are attempting to work out with the government.

20 We don't have a signed document. We have had
21 discussions, but essentially, it would be to return our client
22 to the United States, which would then moot her substantive
23 claims.

24 THE COURT: Thank you.

25 MR. HEAPHY: So, Your Honor, again, we would just

1 move to formally intervene, and hopefully, the Court will grant
2 our motion.

3 THE COURT: All right.

4 MR. REUVENI: Good morning again, Your Honor. This
5 can be very short. We have an agreement in principle.
6 However, in case that doesn't come together, which I don't have
7 any reason to believe it should, there are very similar terms
8 that, as her counsel indicated, if that does not follow
9 through, intervention would not be appropriate in this case.

10 The individual who we are seeking to bring back
11 pursuant to this settlement we have in principle is not an
12 unlawful permanent resident is and not an immigrant visa
13 holder.

14 THE COURT: But she is somebody who went through a
15 carefully vetted review process, correct, before she got the
16 authorization to come here?

17 MR. REUVENI: That's absolutely correct.

18 THE COURT: That's absolutely correct, all right.

19 MR. REUVENI: She is a -- well, actually, sorry, let
20 me clarify.

21 THE COURT: All right.

22 MR. REUVENI: There are different levels.

23 THE COURT: I'm fully aware of that.

24 MR. REUVENI: A K-1 visa is a nonimmigrant visa that
25 fiancees can use to come to the United States and within 90

1 days get married once they arrive here. It is not the same
2 level of rigorous review that may occur in the context of
3 refugees or in other sorts of review scenarios.

4 And the issues that would arise if this case -- and
5 we're not saying they can't bring their case. They can
6 certainly bring their case. It's just not the same nexus of
7 facts or events. It's not the same type of visa. It's not the
8 same type of legal issues. It's not the same sort of due
9 process rights that may be in play.

10 It would unnecessarily complicate this case and
11 essentially set up, if this case moves forward, which we very
12 much hope it does not at least not respect to the Aziz brothers
13 and with respect to the additional individual who wishes to
14 intervene, but it would set up two separate tracks before Your
15 Honor of a nonimmigrant track, an immigrant visa track, and a
16 lawful permanent resident track, so you'd have three separate
17 sets of legal issues.

18 THE COURT: Well, I don't know why it should. If, in
19 fact, the proper way of looking at this case is to simply draw
20 a line in the sand and say that any visas or other
21 authorizations to come into the United States that had gone
22 through the then existing appropriate processes before the
23 executive order went into effect should be implemented, and --
24 so that anybody, whether they're a refugee or they've got a K-1
25 visa or they've got a -- or they're a lawful permanent

1 resident, if that paperwork had gone through, they've been
2 properly vetted through the processes that we've had in place
3 up to this point, why should they not get the benefit of that?

4 Going forward is another question because the
5 executive order has changed that situation, but I'm looking
6 right now and I think most of the -- all of the issues in this
7 case right now are focused essentially on that, that people who
8 have already gotten the permission to be in this country or to
9 come to this country, why should that not be honored?

10 MR. REUVENI: Before I answer that, just one global
11 response to that. I don't know that the issues that the
12 commonwealth wishes to raise, but we'll talk about that later,
13 fall into that category, but with respect to the Aziz
14 plaintiffs and with respect to the individual with the K-1
15 visa, yes, our understanding is they all arrived here over the
16 weekend, which is why the United States government is looking
17 to resolve those particular issues.

18 If I may perhaps just suggest this as a course
19 forward with respect to the motion to intervene, we do have an
20 agreement in principle. At this point, we're simply
21 wordsmithing. There's no principle terms that are in
22 disagreement at this point between the parties.

23 Perhaps we table the motion to intervene for a short
24 period of time, allow us to reach a settlement, and we may not
25 even need to deal with these issues, but we can do that on a

1 short turnaround, if you don't object to that, of course, and
2 we don't have to address this on the legal matter -- on the
3 legal merits.

4 MR. HEAPHY: If I may, Your Honor, I do object to
5 that. We need to be intervened in this case.

6 THE COURT: You want a stake in this litigation just
7 in case.

8 MR. HEAPHY: We need to be in the case. We see it
9 exactly as Your Honor just articulated in your question. This
10 is a matter of whether or not people with lawful visas vetted
11 carefully by the United States government were wrongly and
12 unconstitutionally denied access. That's the situation
13 involving our client with the K-1 visa and those with the
14 immigrant visas.

15 There may be subtle factual distinctions that would
16 be relevant, but the common issues of law and fact in our view
17 compel intervention. We need to be a party in this case,
18 frankly, for leverage to enforce whatever settlement may ensue,
19 and we don't have a settlement until Ms. Fadul sets foot back
20 in the United States, and that has not happened yet.

21 THE COURT: I understand. Well, first of all, I want
22 to commend -- I want to commend the government for working so
23 quickly in trying to resolve these cases. That's great. And I
24 don't want to do anything that's going to interfere with that,
25 but I do agree with Mr. Heaphy that, number one, I think that

1 his clients have alleged sufficient common facts and issues of
2 law that are already included in the amended papers that have
3 been filed in the original case to justify the Court's exercise
4 of its discretion and to allow them to intervene, so the motion
5 is granted, all right?

6 MR. REUVENI: Your Honor, I understand the order, but
7 I just want to verify something for the record.

8 THE COURT: Yeah.

9 MR. REUVENI: I mean, we'll work this out going
10 forward, of course.

11 It is the government's understanding that
12 Mr. Heaphy's client is not in either of the two classes before
13 you in the current -- in the current state of this case. A
14 nonimmigrant visa is very different than an immigrant visa.
15 Very different equities attach. Very different processes
16 occur.

17 THE COURT: Yes, and --

18 MR. REUVENI: Putting that aside --

19 THE COURT: Right.

20 MR. REUVENI: Putting that aside, going forward if we
21 need to, we'll elaborate on that.

22 THE COURT: Thank you.

23 All right, Mr. Raphael?

24 MR. RAPHAEL: Thank you, Your Honor. I stood up
25 before because the permissive intervention and intervention of

1 right issues that you were just talking about are obviously at
2 issue in our case with our motion as well. So we do have a
3 motion to intervene. We filed that on Tuesday. On Wednesday,
4 we filed a proposed complaint in intervention.

5 And I think it's important to start from the
6 standpoint that at this stage of the proceeding, there are now
7 two parties in the case that are in that have, that clearly
8 have standing, and the law is clear, as I believe the
9 government cited in its papers, that you only need one
10 plaintiff to have standing in order for the Court to be able to
11 exercise its Article III jurisdiction.

12 So I'm going to get to in a second why it's
13 absolutely clear that Virginia has standing because of direct
14 injuries to Virginia, but the government argued last night in
15 their brief that we don't have standing, and given that there
16 are now several parties who are plaintiffs in the case, the
17 Aziz brothers and Mr. Heaphy's clients, standing is just not a
18 question.

19 And the case I would cite for that is *Rumsfeld v.*
20 *Forum for Academic and Institution Rights*. It's 547 U.S. 47,
21 at -- pinpoint is 52, note 2, from 2006, where the Court said
22 the presence of one party with standing is sufficient to
23 satisfy Article III's case or controversy requirement.

24 So the government's principal objection to our motion
25 to intervene is that we don't have standing. It's just not an

1 issue given the current posture of the case.

2 They also suggest that the case is somehow mooted now
3 because they're working out a deal to whisk these other
4 plaintiffs back in exchange for their promising to dismiss
5 their cases once they get back to U.S. soil. That's just not
6 accurate as far as the law goes.

7 We cited to the Court *CVLR v. Wynne* in the papers we
8 filed last night. That's 792 F.3d 469, 475. And I have a copy
9 of that. If it would help the Court, I have a copy of that.

10 THE COURT: It's all right.

11 MR. RAPHAEL: Okay. Two sentences that appear at
12 page 475 of that, of that opinion, the first one is that most
13 courts -- this is in footnote 2 -- "Most courts that have
14 considered situations similar to Tosco" -- which was a Tenth
15 Circuit case -- "agree that when the motion to intervene is not
16 filed until after the underlying case is fully resolved, that
17 motion is moot."

18 The underlying case here is obviously not fully
19 resolved. The Aziz brothers and Mr. Heaphy's clients are in
20 the case, and it's not fully resolved, but more importantly, I
21 think this is sort of the -- the important language is further
22 down the page. The Fourth Circuit said, "To the contrary, the
23 case was live when Appellants moved to intervene, and remained
24 so when the district court denied the motion . . ."

25 So if the intervention motion is filed when the case

1 is a live controversy, that is all that is needed, even if the
2 underlying case later becomes moot. So you measure this as of
3 the time the motion to intervene was filed, and that was filed
4 on Tuesday, when this was absolutely a live controversy, and
5 still is.

6 Now, I'm going to address standing. We don't need to
7 because we've got existing parties that have it, but I want the
8 Court to be comfortable that we absolutely have direct injury
9 here. To have standing, you need an injury that's caused by
10 the conduct at issue and that would be redressed by the relief
11 that you're seeking, and we satisfy all three of those
12 requirements.

13 And I point out, by the way, that the federal court
14 in Massachusetts just yesterday in the *Louhghalam v. Trump*
15 case, docket 17-10154, granted Massachusetts' motion to
16 intervene in a case that has a very similar posture, and I
17 actually brought a copy of that order, which I'd be
18 delighted --

19 THE COURT: We've also seen that.

20 MR. RAPHAEL: Okay. Very good.

21 So what is the direct injury here? You know, in the
22 Massachusetts case, Massachusetts was arguing for a much sort
23 of broader notion of standing, to just protect citizens, you
24 know, allowing refugees to come to the state.

25 We're not, we're not challenging the refugee

1 provision in this case. We're here based on direct injury to
2 Virginia, and it's laid out in Taylor Reveley's declaration,
3 which we filed yesterday. That's ECF 32.

4 In the commonwealth, in our 14 colleges and
5 universities, not to mention our community colleges, there are
6 more than 350 students alone at VCU, Virginia Tech, George
7 Mason, UVA, and William & Mary, 350 students who come from
8 these banned countries. There are numerous others at other
9 schools. We haven't been able to tally them all up yet, but
10 that's a lot of students coming to our public schools.

11 We know at this point based on Mr. Reveley's
12 declaration, and this is paragraph 5, there are dozens of
13 employees and faculty who have work visas or LPR status who
14 come from these banned countries.

15 We know of at least two students who are trapped and
16 cannot get back to the United States. One of them is an
17 Iranian doctoral candidate who needs to come back to have his
18 examination for his dissertation, and he was planning to come
19 with his wife. They've been issued visas, and then they were
20 cancelled. They can't get here. And they need to do that this
21 semester.

22 And then we know of a young lady who is a student at
23 George Mason University who's from Libya. Her visa was
24 cancelled when she was in Turkey, and she's stuck in Turkey.

25 Now, to the government's credit, they've been working

1 with us to try to get the information needed so they can free
2 her to come back, and that's one reason why we were willing to
3 set the TRO -- the preliminary injunction hearing for next
4 Friday rather than for, for this Friday, but I think that
5 demonstrates the irreparable harm and injury to Virginia's
6 interests that the executive order is causing right now.

7 There are other harms that are laid out in
8 Mr. Reveley's declaration. For example, a number of scholars
9 have cancelled their travel plans to international conferences.
10 They're afraid to leave the country because they won't be able
11 to get back, and those include some Iranian-born faculty and
12 students. That's paragraph 7 of Mr. Reveley's declaration.

13 We have examples of visiting scholars who've
14 cancelled their plans to come here. There are five people in
15 that category, paragraph 9 of Mr. Reveley's declaration.

16 There are a number of students who have now withdrawn
17 their applications to come to our schools. We're aware of two
18 Sudanese applicants and a handful of Iranian engineering
19 students who, who have withdrawn their applications. That's
20 lost opportunity and lost -- and if you have to put it in
21 monetary terms, obviously, this is much bigger than that, but
22 if you have to put it in monetary terms, that's lost revenue to
23 the commonwealth.

24 All of those direct injuries are plainly caused by
25 the executive order, and they will plainly be redressed by the

1 injunction that we're seeking. We absolutely have standing.

2 Now, the primary group we're here to protect are the
3 students and faculty at our universities and colleges, but we
4 are also here to protect Virginia residents who are here on LPR
5 or work or student visas even if they're not going to our
6 schools, and we have standing for that, too, because they are
7 taxpayers.

8 Under IRS Publication 519, at page 3 to 4, the IRS
9 rules provide that green card holders and others who have been
10 substantially present in the U.S. are considered U.S. residents
11 for tax purposes, and Virginia follows that rule. It's on our
12 Web site under the residency status page at the Department of
13 Taxation Web site. It says, "If you are a resident or a
14 nonresident alien required to file a federal income tax return,
15 and you meet the definition of a Virginia resident, part-year
16 resident or nonresident and other filing requirements, you must
17 file a Virginia return, unless exempted from the requirement by
18 federal treaty."

19 So they're taxpayers, and if they can't be here, we
20 lose that tax revenue. And that kind of trivializes what's
21 really important here, but that's plainly a pecuniary interest
22 that the commonwealth has.

23 And if you need case law to back that up, I've got
24 two suggestions. Number one, *Corr v. MWAA*. That was the
25 Dulles Toll Road case which Judge Trenga decided; and, you

1 know, when I represented MWAA on that case, I argued that the
2 toll payers didn't have standing because a zillion people pay
3 tolls, and that it's not adequate to restrict who the
4 plaintiffs could be, and I persuaded him I was right, but the
5 Fourth Circuit reversed in that case.

6 The Fourth Circuit held -- and this is at 740 F.3d
7 295 (2014) -- the Fourth Circuit held that paying like a \$2
8 toll was enough to give them standing to complain that MWAA was
9 unconstitutional, and the Fourth Circuit let that case go
10 forward. And so if paying \$2 is enough for standing, certainly
11 everything that the commonwealth is losing here is enough for
12 standing.

13 And one other case I'd cite is *Texas v. United*
14 *States*, the Fifth Circuit case from 2015, 787 F.3d 733. You
15 know, Texas challenged President Obama's DAPA policy, and their
16 basis for standing was that because the federal government
17 deemed these people from other countries to be lawfully
18 present, Texas had to spend \$131 on each of them in order to
19 issue them a license or some kind of identifying paper, and
20 that was enough for standing in Texas.

21 So given that low bar, we amply meet it here. We
22 clearly have standing, but again, we don't need it because
23 there are two parties in the case who have it.

24 Now, we have sought both permissive standing --
25 permissive intervention and as of right intervention, and I

1 think I'm going to flip it and take permissive first because
2 it's really, frankly, the easiest way for the Court to decide
3 it. It's totally in your discretion to do it, and this is
4 where I was going to stand up for Mr. Heaphy's client, because
5 I think it's easy to think of his motion to intervene in a very
6 narrow way like we're just dealing with his two clients.

7 This is a much bigger issue, and I think there's a
8 very good chance that you're going to be seeing a lot more
9 motions to intervene, and that's why it's important to
10 understand what permissive intervention is all about.

11 There are three elements. The first one, 24(b)(1),
12 has to be timely. We're here in two days after the original
13 complaint was filed. That is clearly timely.

14 Number two, it has to involve a claim or defense that
15 share with the main action a common question of fact or law.
16 That's 24(b)(1)(B). We only need one of those elements.

17 Both of those elements are satisfied here. There's a
18 common legal claim that the executive order is
19 unconstitutional. We've pleaded the same theories as the
20 underlying complaint. There are also common facts arising from
21 the events this past weekend at Dulles. So for both of those
22 reasons, you clearly have permissive standing under element 2.

23 And there's a third one. The third element is
24 prejudice to the parties. This is 24(b)(3). It says: "In
25 exercising its discretion, the court must consider whether the

1 intervention will unduly delay or prejudice the adjudication of
2 the original parties' rights."

3 Well, there's plainly no prejudice to adjudicating
4 the Aziz brothers' rights. In fact, they consent to our
5 intervention. They're happy for us to be in this case. So no
6 prejudice to their rights.

7 Is there any prejudice to the government's rights?
8 Obviously not. Forcing the government to have to adjudicate
9 the constitutionality of the executive order sooner than they
10 would like to does not prejudice their rights. You're not
11 entitled to do a delay for delay's sake. So permissive
12 intervention is plainly established.

13 We cited a case at page 7 of our brief on this, ECF
14 No. 15, footnote 17, I want to bring to the Court's attention:
15 *Feller v. Brock*. It's 802 F.2d 722, 729 (4th Cir. 1986), and
16 it really captures the purpose of permissive standing --
17 permissive intervention.

18 The court said: ". . . [L]iberal intervention is
19 desirable" -- desirable -- "to dispose of as much of a
20 controversy 'involving as many apparently concerned persons as
21 is compatible with efficiency and due process.'" That was
22 tailor -- in other words, permissive intervention is
23 tailor-designed for exactly this kind of controversy, because
24 when it gets out that what the government is really doing is
25 anybody who comes forward to sue them will be allowed back in

1 the United States, there are a lot of people who are going to
2 want to come forward to take that deal, and you shouldn't make
3 them file a new lawsuit to do that. That's exactly what
4 permissive intervention is for.

5 Let me turn to intervention of right. The federal
6 court in Massachusetts, I know Your Honor is familiar with
7 that, granted Massachusetts' intervention of right as opposed
8 to discretion. It granted it as of right. Similar elements.
9 It has to be timely. We are, two days. You have to show that
10 the intervenor shares -- claims an interest relating to the
11 property or transaction that's the subject of the action and is
12 so situated that disposing of the action may as a practical
13 matter impair or impede the movant's ability to protect its
14 interest unless existing parties adequately represent that
15 interest.

16 I have articulated Virginia's substantial interest.
17 I think that's clearly satisfied. Virginia's interests will be
18 adversely affected were this executive order upheld, and as a
19 sovereign entity, we are plainly not represented by the Aziz
20 brothers or by Mr. Heaphy's clients, so all of those elements
21 are satisfied.

22 Now, you've heard the government say, well, the
23 claims by these plaintiffs and by Virginia are kind of
24 different claims so they shouldn't be in this case. That is
25 not the test for intervention. In the *CVLR* case, you had

1 different plaintiffs who were injured differently by the
2 defendants' common racketeering scheme.

3 Of course they were different claims. The issue is
4 is there a common claim of law or a common claim of fact, and
5 you plainly have that here.

6 Practicality is also a critical aspect of the
7 decision whether to allow intervention, and the Ninth Circuit
8 said in *Citizens for Balanced Use*, 648 F.3d 893, 897: "In
9 addition to mandating broad construction" -- and they're
10 talking about intervention of right -- "our review is guided
11 primarily by practical considerations, not technical
12 distractions."

13 Again, you should be using this vehicle to address
14 this controversy in a broader way than simply focusing on a
15 specific plaintiff's claim.

16 THE COURT: All right, thank you, Mr. Raphael.

17 Let me hear, Mr. Reuveni -- is that how you pronounce
18 your name?

19 MR. REUVENI: Yes, Your Honor.

20 THE COURT: All right. Mr. Reuveni, do you know --
21 first of all, since you are senior litigation counsel, are you
22 overseeing this litigation as a whole, or are you just
23 addressing it in this court?

24 MR. REUVENI: At the moment, I'm just addressing it
25 in this court, but we are, we are, as you know --

1 THE COURT: You're litigating all over the country.

2 MR. REUVENI: We're litigating everywhere right now.

3 THE COURT: Okay. So I would assume down the road,
4 there's going to be some uniform approach to this case -- these
5 cases.

6 MR. REUVENI: I would clearly hope so. It would
7 allow me to sleep more.

8 THE COURT: All right. Do you have any sense at this
9 point as to how many people have been affected by this, that
10 is, how many people to whom -- from these seven countries, how
11 many people had gotten some kind of visa or authorization to
12 enter the United States? Any idea? Are we talking thousands,
13 tens of thousands, hundreds of thousands, or you don't know?

14 MR. REUVENI: Well, I think it's important to
15 distinguish two things here in answering this question. There
16 are the group of people that made their plans, had their visas,
17 and attempted to come over right after the order was signed or
18 may have already been in the air. Let's call that the events
19 of the weekend, January 27th to the 29th. It's a very small
20 number. I don't have the exact figures. It's in the ballpark
21 of between 100 and 200 people. It's a very small --

22 THE COURT: Nationwide, not just coming to Dulles.

23 MR. REUVENI: Don't hold me to that, but let me make
24 sure that's correct as to Dulles versus nationwide, and I can
25 get that to you very quickly afterwards, but that's a much

1 smaller number than the folks that are abroad and can't come
2 here currently because their visas have been revoked, and so
3 the government has submitted in two separate lawsuits, the one
4 in Massachusetts and the one in New York, a notice -- we didn't
5 submit it here because we didn't believe it was relevant to the
6 specific facts at issue in this case, because it involved
7 immigrant visas and lawful permanent resident visas that had
8 come over over the weekend. Visas have been revoked. Over
9 100,000 visas have been revoked. That's the scope of this
10 thing. Those were revoked on Friday at 6:30 p.m.

11 That is not this lawsuit. It is not the lawsuit
12 Virginia wishes to bring, and it is not the lawsuit the
13 plaintiffs -- the named plaintiffs that are already in the case
14 wish to bring, and it is certainly not the lawsuit that the
15 intervenor who you've granted leave to participate, the K-1
16 visa, wishes to bring. Those two individuals and others
17 similarly situated, at least in this case, we are attempting to
18 bring them back and resolve those claims.

19 The individuals abroad who did not get on a plane
20 before any of this happened and are now trying to come into the
21 United States, a very different case, and the government at
22 this time is defending those cases.

23 THE COURT: But what's the logical difference?

24 MR. REUVENI: The logical difference is they are
25 folks that made plans and had sort of just call it a reliance

1 interest. While we were implementing this thing, our clients
2 were implementing the order, and it was a very chaotic 48 hours
3 for all of us, those folks seem to be the ones that have the
4 better argument from the government's perspective as to
5 something not completely perfect from the government's view
6 happened.

7 Those folks that are abroad right now and their visas
8 have been revoked, that's a totally different case, and if we
9 are given the opportunity, if that issue arises in this case
10 and it's certainly already arisen in the Massachusetts case and
11 potentially in the Washington case that the attorney general of
12 Washington is bringing, we would argue, the government would
13 argue that that visa revocation is a non-reviewable
14 discretionary decision committed to the executive discretion.
15 That's by statute, 8 U.S.C. 1201 and 8 U.S.C. 1155, but
16 obviously, we're getting ahead of ourselves here. That's not
17 this case, but that's why we would think that will be a very
18 different lawsuit.

19 So to the extent Your Honor is contemplating that as
20 being part of what you have before you right now, there are no
21 claims to that effect in this case, no plaintiffs in this case
22 with those types of claims. Virginia, I don't believe -- I've
23 seen the complaint that they filed last night or was it two
24 days ago, they don't raise those claims. That would be a very
25 different lawsuit, and there's already other cases addressing

1 that issue -- or where that issue is raised.

2 As to this case, as to the commonwealth and the
3 motion for intervention, I think it's absolutely fundamental
4 that they demonstrate standing if they want to participate in
5 this case or any case. If they were to file their own lawsuit,
6 they would have to have standing. If you grant them
7 intervention, they would still need to have standing because
8 when the Aziz plaintiffs and when the K-1 visa plaintiff, their
9 matters are resolved, there's no one left with standing, and
10 standing has to exist at every step of the lawsuit -- at its
11 commencement, at the motion for preliminary injunction stage,
12 at the motion to dismiss stage, and so on all the way up on
13 appeal. So if they don't have standing, they can't get in this
14 case. They can't bring any case.

15 So this is a pivotal issue to address, and it may not
16 be this venue in which it should be addressed. It should be in
17 their own case, with their own issues, with their own
18 plaintiffs or individuals they've identified through
19 declarations.

20 The issues here are not at all interrelated with the
21 issues I believe the commonwealth is attempting to bring before
22 Your Honor. The LPR issue that they raise, it's a moot point
23 now. We've all seen at this point, I think, the White House
24 guidance on that, and we submitted it with our papers last
25 night on the opposition --

1 THE COURT: But, you know, there's case law that just
2 because there has been a response to alleged illegal activity
3 doesn't get the parties totally off the hook.

4 MR. REUVENI: That's certainly true. I'm familiar
5 with that, Your Honor, but I would say in this case involving
6 the things that happened at Dulles, not a single lawful
7 permanent resident was turned around. They've all been
8 admitted into the United States. They're all in the United
9 States presently.

10 Not a single individual was turned around, so there
11 is no live controversy as to any lawful permanent resident,
12 including the Doe plaintiffs -- or the unnamed Doe plaintiffs.
13 They've all been admitted. We've confirmed that with our
14 client. Not a single lawful permanent resident arriving in
15 Dulles before your order came in and after you had entered Your
16 Honor's order, they've not been turned around. They have been
17 admitted. They're here in the United States.

18 And going forward, lawful permanent residents who
19 wish to come to the United States, the executive order is not
20 being applied to them. They are coming in. They're getting
21 into the United States.

22 So the lawful permanent resident issue from the
23 government's view in this case is a moot point. There are no
24 lawful permanent residents' interests at stake in this case any
25 longer, and so to the extent the commonwealth wishes to

1 piggyback on those interests to get into this case, that would
2 be inappropriate because those claims are moot, and there's no
3 live controversy as to any lawful permanent resident.

4 I do want to talk for a minute about the case that
5 the commonwealth raised with you a number of times concerning
6 its presentation, the *CVLR* case. So that's a very different
7 case. I've had an opportunity to see it as well as the
8 commonwealth. That is a case where a party moved to intervene,
9 and that motion was denied while the case was live. They
10 appealed the denial of the motion to intervene after the case
11 was resolved by the actual named parties.

12 The Court of Appeals said it could exercise its
13 appellate jurisdiction to address the issue of whether that was
14 an erroneous denial of the motion to intervene, and I think
15 it's important, the commonwealth left this part out when it was
16 reading various language to you, that case cites an earlier
17 case from the Fourth Circuit, *Atkins v. State Board*, 418 F.2d
18 at 876, that's a 1969 case: ". . . [A] court may treat
19 intervention as a separate action" only when "the intervenor
20 has an independent basis for jurisdiction."

21 So it's arguable whether that case has any bearing
22 here at all. The cases that are more relevant are those cases
23 cited in the federal government's brief at pages 3 through 4.
24 I'm referring to the Eleventh Circuit, the Tenth Circuit, the
25 Seventh Circuit, and the Ninth Circuit, all of which hold --

1 and the Ninth Circuit en banc at that -- the intervenor has to
2 have standing throughout the litigation. They can't piggyback
3 on standing, particularly where, as here, the actual parties to
4 the case, including the other intervenor who is now in the
5 case, want to resolve the case and move on.

6 We will meet Virginia in court; I have no doubt about
7 that. The question is simply is this case, with very different
8 issues of the actual named plaintiffs, the place to do that.

9 As I mentioned, we are defending these cases
10 nationwide. We're not trying to run and hide from Virginia.
11 We know we're going to be defending this in Virginia and
12 elsewhere. The question simply is whether it should be here in
13 this case.

14 As to the standing itself in this case, from what we
15 know now, Virginia seems to raise two theories as to standing.
16 They wish to sue on behalf of their citizens generally, but
17 that's a settled issue. The Supreme Court settled that in the
18 1920s in the *Mellon* case, and *Massachusetts v. E.P.A.* case in
19 2007 similarly revisited the issue and made clear *Mellon* is
20 still good law.

21 The fact that the federal government 's action causes
22 a general tax burden on your citizens does not provide you
23 parens -- and I'm going to mispronounce this; I'm terrible at
24 latin -- parens patriae jurisdiction or standing. That just
25 doesn't -- that is a nonstarter in the government's view, and

1 we have that in our papers and cases, and we're happy to give
2 you more on that if you'd like.

3 The other, the other injury they raise is the impact
4 to their public universities, and again, I think here it's
5 important to realize what is really being challenged: Federal
6 action in the federal space which is committed entirely to the
7 federal government under the separation of powers on the
8 state-federal system we have. So it is the federal government
9 that actually would have this general welfare of the citizenry
10 jurisdiction or standing to speak on behalf of individuals
11 affected by federal law, not Virginia.

12 And I can refer you specifically to cases addressing
13 this very issue. We have them in our papers. One,
14 *Pennsylvania v. Kleppe* (D.C. Cir. 1976), 533 F.2d 668, or if
15 it's easier, I'll just refer you to the pages in the brief
16 where that --

17 THE COURT: That's all right. We've read it.

18 MR. REUVENI: Okay. Very good. I didn't -- I have
19 no doubt you -- the -- so as to the actual individuals,
20 Virginia speaks in generalities, and that's really not what
21 standing requires. We need specific -- for there to be Article
22 III jurisdiction, there needs to be specific articulated injury
23 as to specific individuals, not the commonwealth writ large.

24 Their papers refer to individuals, generally
25 professors or students, and again, these are individuals who

1 are not similarly situated to the individuals that are
2 currently in this case. F-1 visas and J-1 visas, which would
3 refer to students coming to the commonwealth's universities,
4 those are nonimmigrant visas, and this is the issue I alluded
5 to earlier. This is a very different claim, very different
6 issues, very different legal defense the government would make
7 and different arguments that plaintiffs or the commonwealth
8 would make if that issue was in this case.

9 As to some of the other issues, the commonwealth
10 raised an establishment clause violation as a basis for
11 standing in this case. I'd just like to refer the Court to the
12 Ninth Circuit's decision on this very issue. It's called the
13 *Catholic League for Religious and Civil Rights v. City of San*
14 *Francisco*, 624 F.3d 1050. This one is not in our papers.
15 States cannot allege injury based on religious stigma or
16 spiritual or psychological harm derived from federal action or
17 state action based on -- or impacting religion in some way.

18 The commonwealth doesn't really address that in their
19 papers, but that's another impediment to jurisdiction going
20 forward.

21 Intervention as of right and permissive intervention,
22 their papers as to as of right are premised on the same
23 jurisdictional theory that they cannot rely on. That's the
24 general welfare of the citizenry. So I won't spend too much
25 time on that.

1 Permissive joinder, again, this case is winding down.
2 Well, at least the government believes as to the named
3 plaintiffs, it is winding down. Let me be clear on that. As
4 to also the intervenor you just granted intervention to, that
5 we can resolve very quickly.

6 And it is, it is our position that it is in the
7 interests of the United States to resolve these where it is
8 appropriate, and the commonwealth's papers suggest that we're
9 just trying to get out of a lawsuit. That's -- we're being
10 sued right now in ten different courts. We're going to be sued
11 tomorrow in 20 different courts. That's just not the case.
12 We're defending these cases. We're not playing games with the
13 courts. It's just a matter of whether these particular
14 plaintiffs and the issues in this case are the appropriate
15 vehicle for the commonwealth to come into court and have its
16 day in court, particularly where they at this time so far as
17 the government is concerned don't have standing to raise those
18 claims.

19 If you have any more questions on that, that's enough
20 for me.

21 THE COURT: All right. Well, the issue has been very
22 thoroughly briefed and argued. We've had, obviously,
23 relatively short periods of time for both counsel and the Court
24 to look at all this, but I am satisfied at this point that the
25 commonwealth has made a sufficient argument to establish that

1 it does have standing to enter into this lawsuit both under
2 permissive and as of right principles of intervention, and at
3 this point, I'm granting the motion and therefore will allow
4 the commonwealth to enter into this litigation.

5 There have been no objections from either the
6 original plaintiffs or from the new intervenor, and I therefore
7 find that it is not inappropriate to allow the commonwealth in
8 the case.

9 Now, part of the commonwealth's papers, however, and
10 I'm not actually going to hear a lot of argument on this today,
11 the commonwealth has included a motion for an order to show
12 cause, and I'm not going to grant that motion at this time, in
13 part because I am encouraged by the attitude of the government
14 that they're trying to resolve these cases, and I don't want to
15 stir up the waters unnecessarily.

16 This Court has always taken the position in any type
17 of civil litigation that the most successful litigation is that
18 which can be amicably and appropriately settled, and,
19 Mr. Barghaan, I know you and your office have a great deal of
20 experience with that, and I know the Department of Justice does
21 as well.

22 I have to tell you I've been on this bench a long
23 time. I was the judge that handled the September 11 case. I
24 have never had so much public outpouring as I have seen in this
25 case. It is amazing. I have spoken to some of the other

1 judges in the country who have these cases, and their
2 experience has been the same. This order touched something in
3 the United States that I've never seen before. People are
4 really upset.

5 Now, there is no question the president of the United
6 States has almost, almost unfettered discretion in matters of
7 international relations and in protecting the borders. There's
8 no question about that. But it's not unfettered. There are
9 limits.

10 And this case, this order went into -- was issued so
11 quickly, it's quite clear that there were not all the -- not
12 all the thought went into it that should have gone into it. As
13 a result, there has been chaos. I mean, the example being how
14 the, for lawful permanent residents, they were captured in this
15 order, and now the government has recognized that was a
16 mistake, and they have backed off of that.

17 But it is a real problem, it seems to me, when the
18 government has gone through the vetting process, has authorized
19 individuals to come to this country, and then without any kind,
20 from what we can tell, of significant fact-finding or any kind
21 of actual hard evidence that there is a need to rescind those
22 decisions, to revoke them.

23 Human beings have relied upon those decisions that
24 were made by hard-working government authorities. Families
25 have expected family members to be reunited with them.

1 Universities have expected students or faculty to be able to
2 come back. It has obviously thrown hundreds of thousands of
3 people into states of great discomfort, and it's something that
4 the government should think very carefully about how you want
5 to resolve all of these cases globally.

6 Again, I commend you for having taken the steps
7 you've taken so far, but I don't think it's far enough, and I
8 would hope that you would give serious thought to thinking more
9 broadly about how you want to address these issues.

10 In any case, we have this case scheduled for next
11 Friday for a hearing on a more permanent situation. At this
12 point, all I'm going to do, and I'll have some orders that
13 we'll issue at some point today, the injunction, the temporary
14 restraining order which we issued last Saturday was only for
15 seven days. That's how it was presented to the Court. I want
16 to leave that injunction in place, and I'm going to expand it
17 slightly, but only slightly, and you'll get it later today, but
18 it will be in place until next Friday.

19 I want to make sure that there is no slippage, and
20 that is, that lawful permanent residents clearly are allowed to
21 come back in. I understand the government has agreed to do
22 that. I want to make sure that it is done, so I want to
23 definitely keep that within the language of the injunction, and
24 at this point, that would be maintaining the status quo.

25 Plus, I am concerned about the representations in the

1 commonwealth's papers that although the order had clearly said
2 that people who are being held at Dulles should have the
3 opportunity to have access to counsel, that that was not being
4 done. Now, I understand from the government's papers that
5 there was some telephone arrangement that was set up. I don't
6 want to get into the details of that today other than to say
7 that the agents need to be careful at the airport not to
8 violate a court order because there are sanctions that can
9 result from that.

10 I'm not unsympathetic with the poor Customs and
11 Border Patrol officials at the airport Saturday and Sunday. It
12 was chaotic for everybody, and I'm certainly not going to find
13 that the people at the low level, who were just following
14 orders, that was too confusing a time to find that any of them
15 would have been in contempt.

16 Whether or not any of the people who are more in
17 control should have acted differently, I'm not in a position at
18 this point to address, and frankly, I don't think it furthers
19 the goal of trying to get these issues resolved by pushing for
20 contempt citations at this point.

21 It does appear as though the government is now
22 working diligently to resolve many of the ills involved, maybe
23 not all but many of the ills involved in the original case, and
24 that gives the Court some optimism in this respect, all right?
25 So unless there's anything else, I think I've resolved all the

1 issues.

2 Mr. Raphael?

3 MR. RAPHAEL: Yes, Your Honor, thank you. Just a
4 couple minor points. Just to be clear, we weren't seeking to
5 hold the government in contempt. We were seeking to have them
6 account for what they've done.

7 When Your Honor expands slightly the language of the
8 TRO, I would ask that you make clear that the requirement to
9 permit access to lawyers means in person access. The paragraph
10 7, I think it was, of the motion for a TRO made it clear that
11 there were lawyers waiting there to see these people. There
12 was nothing preventing them from seeing them if they were
13 allowed. They were all -- the people were gathered together.

14 And the government has apparently taken the position
15 that it didn't require in person access. So I think you need
16 to clarify that or -- they say maybe, maybe telephone access
17 was okay. We don't have any records --

18 THE COURT: They indicated -- and again, I wasn't
19 there; I don't know what was going on -- that the folks were
20 being held in the secondary inspection locations, and I don't
21 think counsel are permitted into the secondary area. That's
22 the problem.

23 And so -- but access can be -- I mean, prisoners all
24 the time have adequate access to counsel via telephone.

25 MR. RAPHAEL: Right. And my point is that we don't

1 have any records to show that, in fact, people were being
2 granted access, that the named plaintiffs and the intervenors
3 say that their phones were taken away. Mr. Heaphy's client
4 wasn't allowed to call her fiance.

5 Maybe that was before the TRO issued, but I think
6 that there is something very troubling about the fact that
7 there were so many lawyers there waiting to help, and not a
8 single one of them got to talk with any of the detainees. So I
9 would just ask the Court to make it clear that CBP must provide
10 access to lawyers who are on hand, willing and waiting to help,
11 or it's going to be unfair to these people.

12 THE COURT: All right. Let me hear the government's
13 response to that. I'm sorry, was there another thing?

14 MR. RAPHAEL: Yeah, I had a couple more points. Part
15 of the problem -- part of the consequence of the lawyers not
16 having access is there was a restriction on the flow of public
17 information. We know very little about what was going on
18 there. The fact that lawyers weren't involved means the
19 lawyers couldn't tell us what was going on there.

20 As you know, the attorney general sent a letter to
21 the government on last Sunday with these concerns and asking
22 for the names of Virginia residents who have been removed from
23 the country or blocked from entering, and so I would ask the
24 Court today to require the government to tell the commonwealth
25 of Virginia which Virginia residents have been denied entry or

1 have been removed from the country, and I would ask for the
2 name, the Virginia address, the foreign residence address, the
3 type of visa, a phone number where we can get in touch with
4 these Virginia residents, and an e-mail address if they have
5 it.

6 I would ask for that both retrospectively, anybody
7 whose visas were cancelled, and prospectively, any Virginia
8 resident whose visa is cancelled going forward, and the same
9 for people removed. If somebody's been removed from the
10 country, we'd like to know which Virginia residents were
11 removed both retrospectively and prospectively. I don't think
12 that's asking for a lot.

13 And I want to say one thing about the government's
14 good faith. I am, I am pleased that they are willing to whisk
15 people back when they come to our attention. They're not going
16 to come to our attention if we don't have this list because,
17 you know, please stand forward if you're not here, right? It's
18 hard to know who's affected. So I think that list is really
19 important.

20 And I don't, I don't want to be overly critical of
21 the government on this, but I think it's important to point out
22 that there appears to be some strategic maneuvering here not by
23 counsel but by counsel's client. So whenever one of these
24 folks comes forward and files a lawsuit and intervenes, they
25 are immediately presented with a deal that drop your case and

1 I'll bring your person back and dismiss your case with
2 prejudice, which is exactly why you need a vehicle like this
3 case, where you allow permissive intervention, but there's
4 something very troubling about the way this is playing out.

5 These people were excluded based on national origin
6 on the theory that they were a security risk, but if they can
7 file a lawsuit, you get right back unless you are a security
8 risk. So I'm very -- we're very troubled by that.

9 MR. HEAPHY: Your Honor, before the government goes,
10 can I just add one thing?

11 THE COURT: Yes.

12 MR. HEAPHY: Thank you. It's on the scope of your
13 order on counsel, Your Honor. My client now has a lawyer, and
14 that's me, and arguably, we would be protected by the temporary
15 restraining order in terms of access to counsel, and I just
16 want to be clear that I understand the Court's order correctly.
17 It applies to lawyers' access to all legal permanent residents
18 being detained at Dulles International Airport.

19 When it's extended, Your Honor, I would assume that
20 that allows me to have access to Ms. Fadul despite the fact
21 that she's in this K-1 status, not yet a lawful permanent
22 resident, that the Legal Aid Justice Center and Mayer Brown
23 also have access to their clients upon their return.

24 My understanding is that the government, through its
25 good faith efforts to resolve the case, are going to make

1 efforts to reinstate my client's visa, but when she arrives,
2 we'd very much like to be there and facilitate her processing
3 through CBP so that there is no confusion, that the order is
4 enforced.

5 THE COURT: Well, before this order went into effect,
6 what was the arrangement for access to counsel at Dulles
7 Airport?

8 MR. HEAPHY: I don't know, Your Honor.

9 THE COURT: All right.

10 MR. SANDOVAL-MOSHENBERG: If I may address that?

11 THE COURT: All right, Mr. Sandoval-Moshenberg.

12 MR. SANDOVAL-MOSHENBERG: Thank you, Your Honor. My
13 practice, although I've been practicing immigration for
14 eight-and-a-half years, does not generally involve consular
15 processing, bringing people into the country, but I can tell
16 you that it is not the case that lawyers are never allowed to
17 speak with clients when those clients are taken, for example,
18 into credible fear interviews, for example. So it is -- it
19 would certainly not be the first time, you know, in the history
20 of Dulles Airport that attorneys are allowed back into the CBP
21 area.

22 THE COURT: All right.

23 All right?

24 MR. REUVENI: Maybe I can go now?

25 THE COURT: Yeah.

1 MR. REUVENI: Thank you. Let me take these in
2 reverse order, Your Honor, because there are a number of things
3 here, and it looks like we are going to argue some aspect of
4 the commonwealth's motion, even though we weren't going to, but
5 now we are.

6 You hit on this point earlier, and this is a line, I
7 think, that CBP would have to draw, and this is just, lawyers
8 do not get into secondary inspection unless that becomes a
9 custodial interrogation or a criminal investigation occurs and
10 a right to counsel attaches.

11 The INA is very clear on this, and I want to speak to
12 the Aziz attorney's point. Credible fear hearings, those are
13 an adjudicatory proceeding that you actually have by regulation
14 entitlement to counsel. You're not in secondary when that
15 happens. A credible fear hearing does not occur in secondary
16 with CBP. A credible fear hearing occurs in front of the
17 United States Citizenship and Immigration Service. Totally
18 different entity, not part of this lawsuit at least at this
19 time.

20 I am not aware of, no party has cited any case in
21 which any individual, including citizens returning to the
22 United States who would just go through normal secondary
23 process, have a lawyer in secondary. I don't think it's really
24 hard to imagine what sort of operational problems that may
25 present at the border, but more so in terms of trying to move

1 forward with this litigation and just getting past this weekend
2 and addressing the real issues, that's the sort of thing that
3 the government would probably have to look at very closely if
4 the order was expanding to that.

5 Actually, I will say this: The counsel, pro bono
6 counsel, we are not aware of anyone after Your Court -- Your
7 Honor's order was implemented who -- of anyone asking for
8 counsel who was a lawful permanent resident once they received
9 this document, because they were getting waived through very
10 quickly -- why would you want to talk to a lawyer if you're
11 getting admitted to the United States? -- which suggests things
12 were working fine once your order was operationalized.

13 So there's really -- the government would strongly
14 oppose, and this is really the only issue we're left -- we're
15 opposing here, expanding the order to apply to individuals who
16 are in secondary. That's not the law, and the INA doesn't
17 provide for it, and there's no constitutional right to that for
18 anyone, let alone arriving aliens who have never been admitted
19 to the United States before and have no ties or connection to
20 this country.

21 As to the commonwealth's request for a list, that
22 seems way beyond the scope of the TRO you entered, which had to
23 do with access to counsel, and the commonwealth never mentioned
24 this to us when we in good faith were discussing bringing back
25 these potentially one or two individuals they mentioned.

1 I want to -- since I mention that, I take issue with
2 the fact on behalf of the federal government that the
3 commonwealth is suggesting we're mooting cases out
4 strategically. Everyone in this courtroom knows very well we
5 have dozens of these across the country. Some of them we are
6 litigating; some of them we're not.

7 As to the events that happened on the weekend, those
8 seem like cases we're looking to resolve because that is an
9 entirely different scenario than people now trying to come to
10 the United States with a revoked visa. Those we're defending.
11 Those at this time we're continuing to defend. There's no
12 strategic mooting of cases out occurring here from the
13 government's view.

14 Back to the list, I mean, we would oppose that. We
15 don't see any reason for it right now, and frankly, it would
16 complicate moving forward with trying to resolve some of these
17 cases if we have to dig in and look for names, and I don't see
18 its relevance right now. I don't see its helpfulness to where
19 we are in this case right now, and at the very least, we would
20 request, Your Honor, an opportunity to provide a brief opposing
21 that.

22 THE COURT: Well, again, how many people do you think
23 as best you can tell were removed from Dulles over the weekend?

24 MR. REUVENI: So now that we're talking about not
25 just lawful permanent residents --

1 THE COURT: The whole --

2 MR. REUVENI: Everyone --

3 THE COURT: Yeah.

4 MR. REUVENI: -- trying to come into Virginia, I
5 don't know the answer because the answer I had before I came to
6 court today was limited to lawful permanent residents, which
7 was zero people removed over the weekend.

8 So I don't have the answer as to nonimmigrants, and I
9 don't have the answer as to individuals who had immigrant visas
10 but had not yet been admitted to the United States so had not
11 yet been lawful permanent residents.

12 THE COURT: And among -- I'm sorry, among the people
13 who were removed on Saturday and/or Sunday, did that include
14 refugees? If you know. If you don't know, I mean,
15 obviously -- yeah.

16 MR. REUVENI: No, I'd be speculating. I'd like to
17 say no, but I'm speculating.

18 THE COURT: All right.

19 MR. REUVENI: So I'll just go with I don't know right
20 now.

21 THE COURT: Okay.

22 MR. REUVENI: If need be, if necessary, I can find
23 out, but what I do know, not a single lawful permanent resident
24 even before your order was entered, between the time the
25 executive order was signed and your TRO was -- CBP received

1 notice of it, and thereafter, no lawful permanent residents
2 were removed. The government -- every single one has been
3 admitted to the United States that I'm aware of, and those that
4 would now proceed to continue to try to come to Dulles and get
5 on a plane, the way that they're supposed to be working is they
6 get on a plane, they arrive at Dulles, they don't otherwise
7 have some reason under the INA during the secondary inspection,
8 if they get through secondary, to be denied entry, they're
9 admitted to the United States.

10 THE COURT: Are lawful permanent residents normally,
11 normally required to go through secondary?

12 MR. REUVENI: No one is required to go through
13 secondary if they're a lawful permanent resident, but everyone
14 including citizens can be asked to go through secondary.

15 THE COURT: Right. All right, so there has never
16 been an established practice in the past that all LPRs must go
17 through secondary?

18 MR. REUVENI: I'm not aware of one.

19 THE COURT: And is that what's happening now? That
20 is, those LPRs who are being permitted, permitted back in the
21 country from those particular countries, are they all required
22 to go through secondary?

23 MR. REUVENI: Well, no. To be clear, we're talking
24 about two different points in time. So we're talking about the
25 weekend, and yes, at that time, lawful permanent residents were

1 going through secondary and then getting this waiver process
2 that the executive order anticipates and outlines, and they
3 were getting waived through pretty quickly, 15 to 30 minutes
4 after, by Sunday is my understanding.

5 Going forward, no. We have the White House guidance
6 that we attached to our intervention. The way that our --
7 opposition to intervention. The way that is being
8 operationalized, they are not, they are not going through
9 secondary.

10 If there is an independent reason other than the
11 executive order, as it would have been before the order was
12 signed on Friday, to go to secondary, they're going to
13 secondary, as everybody else would if the order didn't exist.

14 THE COURT: So it's your understanding that lawful
15 permanent residents now are being treated exactly the -- from
16 those seven countries are being treated the same as they would
17 have been treated a year ago.

18 MR. REUVENI: Correct. So the guidance and the way
19 that it's being implemented, sections 3(c) and 3(e) of the
20 executive order that would otherwise apply if read that way to
21 lawful permanent residents does not apply to them, so they are
22 to be treated -- are being treated so far as I know as though
23 it was 4:21 Friday.

24 THE COURT: But you would agree with me that within
25 the four corners of that document, that is not included. It

1 required the additional statement by counsel to make it clear
2 that they were not included within the executive order.

3 MR. REUVENI: Well --

4 THE COURT: I didn't see the word "lawful permanent
5 residents" in there.

6 MR. REUVENI: No, that is in there. "I understand
7 that there has been reasonable uncertainty about whether those
8 provisions" -- and I'm reading from the counsel for the
9 president's memorandum, back to the language -- "apply to
10 lawful permanent residents of the United States. Accordingly,
11 to remove any confusion, I now clarify that Sections 3(c) and
12 3(e) do not apply to such individuals. Please immediately
13 convey this interpretive guidance to all individuals
14 responsible for the administration and implementation of the
15 Executive Order."

16 So at least in the government's understanding of
17 this, no lawful permanent residents are going to secondary
18 solely on the basis of the executive order. Again, if there's
19 some independent basis that it preexisted the executive order
20 that's in the INA, yes, they're going to secondary, but other
21 than that, no. The order does not apply to them so far as the
22 government is concerned.

23 THE COURT: All right.

24 MR. REUVENI: Thank you.

25 THE COURT: Mr. Raphael?

1 MR. RAPHAEL: Just a couple points. Just on that
2 last point, section -- as we, as we read the executive order,
3 it does apply to lawful permanent residents. There is an
4 exemption -- an exception in 5(g), but it requires case-by-case
5 review.

6 And so what's happened here is after the chaos
7 developed, I think the government realized they made a mistake
8 or at least it wasn't turning out as they planned, and the
9 secretary has promulgated this sort of categorical decree that
10 if you're an LPR, you can come in. I don't, I don't see how
11 that comports with 5(g), which required case-by-case review.

12 But Your Honor touched on it earlier. Under the
13 voluntary cessation doctrine, they snap their fingers; they
14 change it. They can snap their fingers back, and unless the
15 wrongful conduct is absolutely certain not to recur, they can't
16 moot the case out by changing their -- by changing what they're
17 doing.

18 On the issue of the list, this is no surprise. We
19 asked for this list last Sunday. We might not have gotten in
20 this case if they'd given it to us and we could figure out the
21 full extent of the damage to Virginia residents.

22 We're here seven days after this order was issued,
23 only five business days, and we know of these two students who
24 were stranded that I mentioned earlier, and yeah, we're trying
25 to get them back, but there could be many others, and we can't

1 find them unless we know who they are. It is not an
2 unreasonable request for the government to tell us which
3 Virginia residents they have not let in or who have been
4 removed, and I think that's very reasonable.

5 And the last thing I might ask, Your Honor, given a
6 showing of cooperation here, if Your Honor might consider
7 appointing a magistrate judge who might facilitate mediation
8 efforts, such as Magistrate Judge Buchanan, who's been
9 extremely successful on these things.

10 THE COURT: All right. Well --

11 MR. REUVENI: Your Honor, just one last point?

12 THE COURT: Yeah.

13 MR. REUVENI: I just want to clarify any confusion
14 here. Paragraph 5(g) that counsel refers to applies to
15 refugees. Paragraph 3 applies to lawful permanent residents.
16 That's why the White House guidance says nothing about
17 paragraph 5. Refugees coming here are not lawful permanent
18 residents; they're refugees, different category. Maybe one day
19 they will become lawful permanent residents, but refugees don't
20 have that status when they arrive in the United States.

21 THE COURT: All right, thank you.

22 MR. RAPHAEL: I'm sorry, it's 3(g), not 5(g). 3(g)
23 does apply. 3(g).

24 MR. REUVENI: You said 5(g).

25 THE COURT: You had said 5(g).

1 MR. RAPHAEL: I apologize, it was 3(g). That calls
2 for case-by-case review.

3 THE COURT: All right.

4 MR. REUVENI: On the list, again we would, we would
5 oppose what the commonwealth is proposing, and we think it
6 would change the tenor of this litigation dramatically, but if
7 you would like us to get back to you with a brief on that, we
8 can do so. We just haven't had enough time to think of that or
9 respond to it. It just came up today.

10 THE COURT: All right.

11 MR. REUVENI: As to the letter, I mean, I would say
12 one last thing; I apologize, Your Honor. The letter asked us
13 to respond to ongoing litigation. I think we all understand
14 the position that puts the U.S. government in when we're asked
15 to give information that could affect ongoing litigation.

16 THE COURT: All right. Well, we'll take a look at
17 that issue in chambers, but at this point, then I've allowed --
18 granted the motions to intervene. We're going to extend the
19 temporary restraining order to keep things somewhat in place.

20 The access to counsel issue is a troubling one
21 because I -- my experience having handled many cases at Dulles
22 is that, in fact, the government's position is correct that
23 normally, under normal circumstances, counsel would not have
24 the right to have direct, in person contact with people who are
25 held up in the process there.

1 There are exceptions, and I do believe in one of your
2 sets of papers, there was discussion about reference of people
3 to hotlines or telephone contact with various agencies that
4 provide legal counsel in immigration. So I'll see what makes
5 sense to me.

6 I mean, I do think that probably this issue is
7 somewhat less pressing than it was on Saturday because at this
8 point, I don't think folks are coming to the airport who would
9 be covered by this, right? I mean, are there any more issues
10 of people who have been coming to the airport and being turned
11 around since this weekend?

12 MR. RAPHAEL: Well, I mean, LPRs, I guess after the
13 government's change in position, are now allowed in.

14 THE COURT: LPRs are coming in, and the problem now
15 is from your standpoint, is that everybody else is basically
16 stopped because the airlines won't let -- they aren't getting
17 the visas.

18 MR. RAPHAEL: That's right.

19 THE COURT: Yeah.

20 MR. RAPHAEL: And Your Honor's TRO applied only to
21 LPRs.

22 THE COURT: Correct.

23 MR. RAPHAEL: And so I think the counsel issue is
24 still a live issue if they have problems going forward.

25 THE COURT: If LPRs have problems.

1 MR. RAPHAEL: Yes, yes.

2 MR. REUVENI: Yes. No one is getting turned around
3 at the airport if they're a lawful permanent resident. If
4 they're not and they don't have a valid visa, practically
5 speaking, they're not getting on a plane to get here, so that
6 can't be an issue unless and until they do.

7 THE COURT: All right, thank you.

8 All right, I think that resolves everything for
9 today. We will recess court until 12:00.

10 MR. RAPHAEL: Thank you.

11 (Which were all the proceedings had
12 at this time.)

13

14 CERTIFICATE OF THE REPORTER

15 I certify that the foregoing is a correct transcript of
16 the record of proceedings in the above-entitled matter.

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/s/
Anneliese J. Thomson